No. 80-633

In the Supreme Court of the United States

OCTOBER TERM, 1980

RONALD HACKENBERGER d/b/a RON'S TRUCKING SERVICE,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly found that a back pay claimant had made a reasonable effort to find alternative employment during the back pay period.

2. Whether petitioner was prejudiced by the Board's refusal of its requests for prehearing discovery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 628 F. 2d 966. The supplemental decision and order of the Board (Pet. App. B and C) are reported at 236 N.L.R.B. 1065.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1980. The petition for a writ of certiorari was filed on October 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Board found that petitioner had unlawfully discharged one of its employees, William F. Brown, Sr. The Board therefore ordered petitioner to reinstate Brown, and to make him whole for any loss of earnings suffered as a result of the unlawful discharge (217 N.L.R.B. 736 (1975)). The court of appeals upheld (531 F. 2d 364) the Board's order, and this Court denied certiorari (429 U.S. 830 (1976)).

Petitioner then contested the amount of back pay that was due to Brown. Accordingly, the Board's Regional Director issued a back pay specification and ordered a hearing.[1] The administrative law judge who heard the evidence rejected petitioner's assertion that Brown had not made a reasonable attempt to secure interim employment. The administrative law judge noted that Brown had registered with the Norwalk, Ohio unemployment office within two days after his discharge, and that he had, throughout the backpay period, continually checked in with that unemployment office, as well with one in Sandusky, Ohio,

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[1]Section 102.53(a) of the Board's Rules and Regulations, 29 C.F.R. 102.53(a), requires that the back pay specification show "the back pay periods broken down by calendar quarters, and specific figures and basis of computation as to gross back pay and interim earnings, the expenses for each quarter, the net back pay due, and any other pertinent information".

regarding work opportunities (Pet. App. C 3; A. 114-119, 146).[2] Brown also traveled to Fremont and Cincinnati, Ohio, attempting to obtain employment through the Teamsters Union offices there, and he sought employment with various employers in Ohio, Michigan, and Kentucky during his period of unemployment (Pet. App. C 3; A. 119-125, 142-146). Brown also regularly checked the help-wanted advertisements in local newspapers, and he used his niece's telephone to inquire about jobs for which he thought he might qualify (Pet. App. C 3; A. 126-127). Brown secured interim work with two employers during the back pay period, but the administrative law judge found that Brown was justified in leaving both of those jobs (Pet. App. C 7).[3]

The administrative law judge concluded that, "[w]hen not employed since his unlawful discharge in 1974, Brown has continually made a good faith effort to obtain other employment and [petitioner] has wholly failed to meet its burden that Brown has not done so" (Pet. App. C 7). The administrative law judge noted that petitioner "made no effort to show that jobs were actually available and that [Brown] would have obtained employment had he sought work as he testified" (Pet. App. C 4).

The Board affirmed the decision of the administrative law judge on the merits (Pet. App. B). The Board also rejected petitioner's contention that the denial of its

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[2]"A." references are to the appendix in the court of appeals.

[3]Brown quit his job at T & T Home Maintenance after he had been instructed to engage in the questionable practice of stripping paneling from an unoccupied home for the personal use of his boss (Pet. App. C 4; A. 128-131). On two occasions during his employment at an Imperial gas station, Brown quit after being forced to forfeit part of his pay to make up for cash shortages for which he was not responsible (Pet. App. C 4 to C 5; A. 132-139).

requests for pre-hearing discovery constituted a denial of due process.[4] The Board pointed out that all of the requested material had been supplied to petitioner at the beginning of the hearing and that petitioner had then proceeded to cross-examine the General Counsel's witnesses with the aid of the information supplied, without requesting a continuance to examine the material (Pet. App. B 2 to B 3). The Board concluded that petitioner had not been prejudiced by the denial of prehearing discovery in these circumstances (Pet. App. B 3).

2. The court of appeals upheld the Board's supplemental decision and enforced its order, concluding that petitioner had failed to establish that the Board's back pay award was improper (Pet. App. A 1 to A 2). The court held that petitioner "was not subjected to unfair or unreasonable requirements" by the Board's prehearing discovery policy, and specifically noted that "when information concerning interim employment was provided at or near the beginning of

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[4]Petitioner's request to take Brown's deposition was denied because petitioner did not allege that Brown would be unavailable to testify at the hearing (A. 19-20).

Petitioner's request for the production of all documents in the Board's possession relating both to Brown's interim employment and to the Board's back pay computation was denied, except that Brown's social security records were supplied under the Board's then-existing policy of providing counsel with social security records and letters from interim employers in advance of the hearing (A. 26-28).

Eight days before the scheduled hearing, petitioner requested substantially the same information under the Freedom of Information Act, 5 U.S.C. 552 (A. 33). This request was denied by the Board's Regional Director four days later (A. 34-36), and petitioner did not appeal this determination to the General Counsel.

Subsequent to the hearing at issue here, the General Counsel issued new guidelines providing for greater disclosure in backpay cases. The new guidelines, which constitute an amendment to the operational manual which the General Counsel provides for the guidance of his staff, *N.L.R.B. Casehandling Manual—Compliance Proceedings*, pt. 3 (1977), are set out in pertinent part in the petition (see Pet. 5).

the supplemental back pay proceedings, counsel for petitioner did not request a continuance or adjournment of the hearing in order to familiarize himself with the material and undertake any further preparation related thereto" (*ibid.*).

ARGUMENT

1. In making an employee whole for loss of pay that results from an employer's unfair labor practices, the employee's actual interim earnings and any losses willfully incurred are deducted from gross pay. *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 197-198 (1941). Back pay may be reduced, under the willful loss of earnings doctrine, to the extent that the employee "fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work or voluntarily quits alternative employment without good reason." *NLRB* v. *Mastro Plastics Corp.,* 354 F. 2d 170, 174 n.3 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). Accord, *Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO* v. *NLRB,* 547 F. 2d 598, 602-603 (D.C. Cir. 1976), cert. denied, 429 U.S. 1078 (1977). The General Counsel's burden in the back pay proceeding is limited to showing the gross back pay due the employee, that is, what the employee would have earned if the employer had not violated the Act. *NLRB* v. *Mastro Plastics Corp., supra,* 354 F. 2d at 175-176. Once the General Counsel has established the amount of back pay due under an appropriate back pay formula, "the burden is upon the employer to establish facts which would negative the existence of liability * * * or * * * mitigate that liability." *NLRB* v. *Brown & Root, Inc.,* 311 F. 2d 447, 454 (8th Cir. 1963). Accord, *NLRB* v. *Reynolds,* 339 F. 2d 668, 669 (6th Cir. 1968); *NLRB* v. *Arduini Mfg. Corp.,* 394 F. 2d 420, 423 (1st Cir. 1968).

Petitioner does not cotest the validity of these well settled principles. Instead, petitioner challenges (Pet. 30) only the Board's factual finding, which was upheld by the

court of appeals, that Brown was reasonably diligent in seeking interim employment. That factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

Contrary to petitioner's contention (Pet. 19, 33-34), the decision below is not inconsistent with the Ninth Circuit's decision in *NLRB* v. *Mercy Peninsula Ambulance Service*, 589 F. 2d 1014, 1018-1019 (1979), in which the court concluded that an unlawfully discharged employee had not exercised reasonable diligence in seeking interim employment. In that case, the record showed that during the back pay period, the employee had attempted to secure employment on an average of three times a month over nine months; that he had not followed up job leads; that he had evidenced a lack of interest in finding work; and that he had devoted a substantial amount of his time to promoting an employee association (589 F. 2d at 1018-1019). Thus, *Mercy Peninsula* is distinguishable on its facts from the instant case, where the record shows that Brown made persistent efforts to secure interim employment, traveling far outside his home area in search of work.[5]

2. There is no merit to petitioner's contention that it was denied a fair hearing through the denial of its prehearing discovery requests.[6] It is settled that, so long as the Board

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[5]Even assuming the correctness of petitioner's contention (Pet. 32) that Brown visited fewer than twenty-five potential employment sources during the period of his unemployment, the record also shows that Brown continuously sought work through other channels—such as unemployment offices, Teamsters Union locals, and newspaper employment notices—and that he actually found interim work with two employers before quitting under justifiable circumstances (see pages 1, 2 & note 3, *supra*).

[6]No issue is raised here under the Freedom of Information Act, 5 U.S.C. 552. Petitioner's FOIA request was denied by the Regional Director and, although petitioner was advised of its right to appeal to the General Counsel, it did not do so (Pet. App. B 2 to B 3; A. 34-36).

conducts its proceedings in accordance with the requirements of due process, the question whether to permit prehearing discovery is within the Board's discretion. See *NLRB* v. *Valley Mold Co.*, 530 F. 2d 693, 695 (6th Cir.), cert. denied, 429 U.S. 824 (1976); *D'Youville Manor, Lowell, Mass., Inc.* v. *NLRB*, 526 F. 2d 3, 7 (1st Cir. 1975); *NLRB* v. *Interboro Contractors, Inc.*, 432 F. 2d 854, 858 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971); *Electromec Design & Development Co.* v. *NLRB*, 409 F. 2d 631, 635 (9th Cir. 1969); *NLRB* v. *Vapor Blast Mfg. Co.*, 287 F. 2d 402 (7th Cir. 1961).

Here, the Board found that petitioner was not prejudiced by having less extensive prehearing discovery than that which it sought. That finding, which was upheld by the court of appeals, turns on the particular circumstances of this case, and it raises no issue that warrants further review.[7]

At all events,the Board's finding is clearly correct. At the commencement of the hearing, petitioner received all the information that it had previously sought in its prehearing discovery demand. Prior to the examination of any witnesses, the General Counsel gave petitioner all the documents that Brown had provided to assist in the computation of the backpay specification (A. 43, 112-113). Specifically, the General Counsel gave petitioner a list of the potential employers whom Brown had contacted in his search for interim employment, Brown's social security forms, his tax returns, and the results of a physical examination which showed Brown's fitness for truck driving work (Pet. App. B 2; A. 112-113).

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[7]The issue raised by petitioner also lacks general importance in light of the General Counsel's intervening revision of the operational manual, which now provides for prehearing disclosure of such materials in back pay cases. See page 3, note 4, *supra*.

Essentially, petitioner bases its due process claim on the contention that it was prejudiced by not having the requested material in advance of the hearing. As the Board and the court of appeals both noted, however, petitioner did not request additional time to examine the documents when they were provided, but proceeded to cross-examine Brown when he was produced as a witness by the General Counsel (A. 147-162). Following the hearing, petitioner made generalized claims of unfairness and suggested that it had been denied a meaningful opportunity for cross-examination (A. 70-77), but it never attempted to substantiate its claims by demonstrating with specificity how the timing of the disclosure had prevented it from either following up useful leads or asking pertinent questions of witnesses. When the hearing was terminated, petitioner expressed no interest in calling further witnesses or submitting additional evidence, and petitioner never sought thereafter to reopen the record to submit evidence discovered through leads provided either by Brown's testimony or by the materials that were disclosed at the hearing.[8]

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[8]Following the hearing, petitioner submitted a post-hearing affidavit from an available witness who had not been called, which affidavit supported a version of events that conflicted with the testimony of one of petitioner's own witnesses. That affidavit was striken from the record by the administrative law judge (Pet. App. C 6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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